SUPREME COURT, U. S.

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No. 997

In the Supreme Court of the United States

OCTOBER TERM, 1969

ASSOCIATED TRUCK LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

MOTION TO AFFIRM

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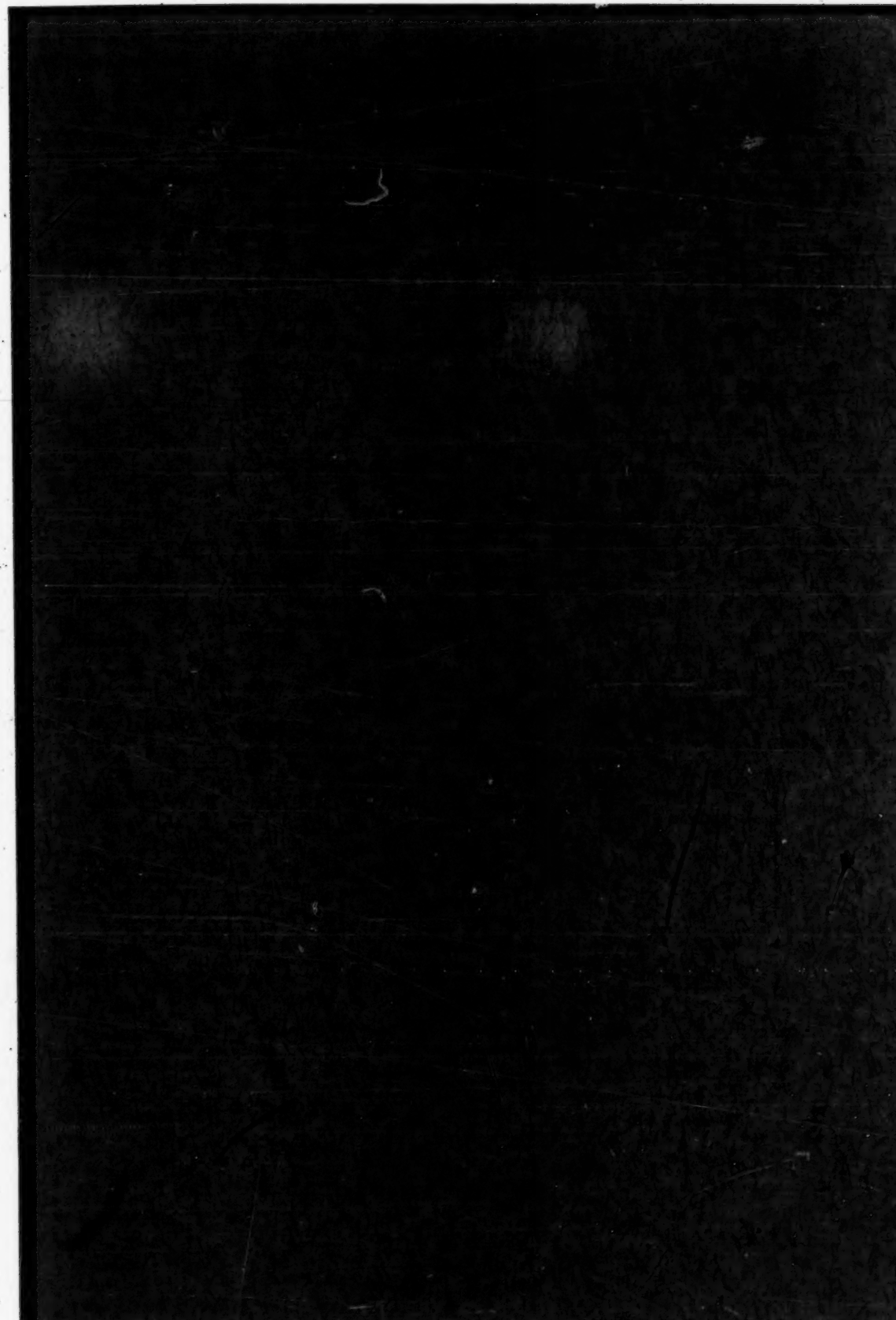

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal by a motor common carrier from the final judgment of a three-judge district court (J.S. 1a–5a) dismissing an action brought to set aside an order of the Interstate Commerce Commission (J.S. 6a–29a). The order required the cancella-

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tion of a tariff item discontinuing appellant's participation in through routes, joint rates and interchange arrangements for the truck transportation of furniture. The Commission found such discontinuance inconsistent with Section 216(b) of the Interstate Commerce Act, 49 U.S.C. 316(b).

Appellant is a motor common carrier of general freight, operating principally in Indiana, Michigan and Ohio.[1] Early in 1965, believing its share of the charges on shipments of furniture from the South to be inadequate, appellant sought to publish a tariff item, by which it would have discontinued its participation in joint rates on furniture, while leaving intact the other through routes and interchange arrangements that it had negotiated with connecting truckers serving the South. On protest of the National Furniture Traffic Conference, Inc., among others, the Commission ordered the new tariff item suspended. Following investigation the Commission held that the tariff item had not been shown to be just and reasonable, and was in violation of Section 216(b).[2]

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[1] According to appellant's annual report, appellant's operating revenue reached $41 million in 1968, with an operating ratio of about 94.6.

[2] Appellant, in its supporting statement filed with the Commission, declared its action reasonable and justified "due to the underpricing of transportation rates on light and bulky shipments of furniture and the disparity in such pricing in relation to other commodities of similar densities becoming greatly accentuated on joint line movements since carriers must divide the through revenue" (page 11).

[3] Order of the Commission, Division 2, acting as an Appellate Division, entered November 24, 1965, in Investigation and Suspension Docket No. M-19650, *Furniture Restrictions Between Central and Southern States*, not printed.

Appellant thereupon published the tariff item assailed in this case, effective May 1, 1966. The Conference again complained, and appellant in its responsive statement attempted, as it had in the prior proceeding, to justify its action by asserting that the revenue it received from participating in through joint-line movements of furniture was insufficient.[4]

The Commission observed that the appellant continued to hold itself out to transport furniture, but only upon tender by the shipper itself, rather than by a connecting trucker, and only upon payment of the higher local rates, which the Commission had previously held were not shown to be just and reasonable. The Commission held that such deliberate discouragement of the movement of furniture, while the appellant continued to participate in through routes, joint rates and interchange arrangements on other general commodities the transportation of which the appellant deemed to be more desirable, constituted an unreasonable and discriminatory practice in violation of Sections 216(b) and 216(d) of the Act (J.S. 19a–21a). To the appellant's complaint of inadequate revenue, the Commission replied, "The short answer to this claim is that other remedies are available under other sections of the act" (J.S. 20a). Upon review, the three-judge district court unanimously sustained the Commission (J.S. 5a).

[4] In its statement filed with the Commission appellant said that "the division of revenue accruing to it on joint line shipments of furniture * * * was not only non-compensatory but was seriously eroding the profits from other more compensatory traffic * * * (page 6).

ARGUMENT

The question presented by this appeal is insubstantial, and is similar to that in *Greyhound Lines* v. *United States*, 268 F. Supp. 746 (N.D. Ill.), affirmed *per curiam*, 389 U.S. 216.[5]

Appellant here has invoked the device of seemingly cancelling a through route in an evident attempt to resolve a rate problem which it deemed to be frustrating. That such a withdrawal in another context might be perfectly lawful and within the scope of management's discretion does not negate the fact that in this case its result was unfair discrimination. As a court observed in a similar situation, "* * * the unauthorized imposition of an embargo on a particular service because the continuation of that service would result in a financial loss is an unlawful practice * * *." *New York Central R. Co.* v. *United States*, 201 F. Supp. 958, 960 (S.D. N.Y.), appeal dismissed for mootness, 371 U.S. 805.

[5] Appellant *Greyhound* in its jurisdictional statement (No. 555, O.T., 1967, p. 4) claimed: "The Interstate Commerce Act does not give the Commission power to compel carriers to enter into [joint traffic arrangements], and the Commission in its report does not claim that it has that power and does not base its holding upon the premise that it has that power. It is a well settled common-law rule, recognized by the District Court, that where the Commission does not have power to compel carriers to enter into a joint traffic arrangement it may not forbid withdrawal from such an arrangement that has been voluntarily established. The Commission, of course, lacks the power to change the common law, and it followed this common-law rule for many years in cases involving the construction of § 216(g) and other sections of the Act until the decision here in issue. Accordingly, we say that § 216(g) does not authorize the Commission's order."

The appellant erroneously attributes to the Commission the position that a motor common carrier of general commodities who has undertaken to participate in through-route, joint-rate arrangements with connecting carriers is unable to withdraw therefrom (J.S. 6). Although urged by the Conference to take such a position, both the Commission and the lower court specifically rejected it (J.A. 3a, 21a–22a). As the lower court noted, " * * * we find it unnecessary to decide that issue because the Commission found that Associated's selective cancellation here clearly placed furniture shippers in a disadvantaged position relative to other general commodities, and found such disadvantage to be undue and unreasonable, and hence unlawful under Section 216 (b), (c) and (d). American Trucking Association v. A.T. & S.F. R. Co., 18 L. Ed. 2d 847, 863 (1967); Greyhound Lines, Inc. v. U.S., 268 F. Supp. 746 (N.D. Ill., E.D. 1967); Crescent Liquor Co. v. Platt, 148 Fed. 894, 900–902 (N.D. W. Va. 1906)."[6]

Whether a rate is just and reasonable and non-discriminatory is a question of fact, and it is for the Commission to decide that question upon its consideration and weighing of the evidence. *Board of Trade* v. *United States*, 314 U.S. 534, 546; *Illinois Central & C.R.R.* v. *Interstate Commerce Commission*, 206 U.S. 441, 454, 466; *Cin., N.O. & Tex. Pac. Ry.* v. *Inter-*

[6] The direction to the Board of Suspension to suspend similar tariff filings (J.S. 22a) is not a prejudgment of the issues then to be investigated by the Commission under Section 216(g) of the Act nor a denial of the respondent's right to cancel through-route, joint-rate arrangements on particular traffic, as alleged by appellant (J.S. 11).

state Commerce Commission, 162 U.S. 184, 196. The lower court, upon examination of the record, properly found that substantial evidence supported the Commission's finding that the assailed tariff item was unlawful (J.S. 5a).

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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